

IN SENATE OF THE UNITED STATES.

AUGUST 9, 1848.

Submitted, and ordered to be printed.

MR. NILES made the following

REPORT:

[To accompany bill S. No. 346.]

The Committee on Post Offices and Post Roads, to whom was referred the petition of Samuel F. Butterworth, submits the following report:

That, on the 23d day of October, 1837, S. B. Stark contracted with the Post Office Department to carry the mail on route No. 3801, from Jackson to Columbus, in Mississippi, from January 1, 1838, to June 30, 1842, at the rate of pay of \$3,625 for each quarter. On the 1st day of July, 1839, said Stark sold to the petitioner one-half of his stock and one-half of his interest on the contract, for the consideration of five thousand dollars. Before said contract had expired, viz., on the 21st day of September, 1839, a new contract was made with the department by said Stark and the petitioner, in the name of Stark & Butterworth, to convey the mail on said route for the same rate of pay, for the unexpired part of the time of said Stark's contract, so that this contract was to expire on the 30th June, 1842.

It appears that, on the 23d of September, 1839, three days after this joint contract, Stark wrote the Auditor of the department, directing him to remit one-half of what would be due for the quarter ending the 30th of September to the petitioner, and to apply the other half, which he says belonged to him, on a draft which he had previously drawn, and which remained unpaid.

Said Stark also drew a draft in his own name for \$1,900, in favor of Y. N. Oliver, the date of which does not appear, but which was enclosed in a letter to the Auditor, dated the 4th of October, 1839. This draft was received by the Auditor, and an entry made on the books "left on file with Colonel C. K. Gardner, to be paid when they they can pay it, but nothing can be paid out of the September quarter's pay; Stark is only half owner, and had given previous orders, 15th October, 1839."

Whether the petitioner knew of this draft, at the time it was

drawn by Stark in his own name, does not appear; but it does appear that he subsequently knew of it, and assented to its being paid from the proceeds of their contract.

On the 1st of January, 1840, a letter or notice was sent to the Auditor, in the following words:

COLUMBUS, January 1, 1840.

SIR: We give you below our signature. You will please pay from any moneys now due, or that may hereafter become due, all drafts drawn over this signature. You will please pay no other drafts drawn by either of us, except one drawn by S. B. Stark, for \$1,900, and now held by Major Andrews, as agent for Y. N. Oliver; the residue of the pay now due us, and that may become due during the year 1840, will be necessary to enable us to carry the mail on route No. 3801, from Columbus to Jackson.

With great respect, we annex our signatures,

STARK & BUTTERWORTH.

C. K. GARDNER, Esq.,

Auditor Post Office Department.

It is proved, by the affidavit of said Stark, that he assented to this letter or notice, and that it was in the handwriting of the petitioner. But it is not proved that the handwriting of the petitioner was known to the Auditor. Previous to this notice, on this 9th day of December, 1839, Stark transferred and sold all his interest in said contract, and in the stock and other property of the firm, to the petitioner.

On the 10th of March, 1840, more than three months after said notice, Stark made the following draft on the Auditor:

COLUMBUS, MISSISSIPPI,

\$2,862 36.]

March 10, 1840.

SIR: On presentation of this, my order, which is irrevocable, please to pay to Mr. James Gould, of Albany, New York, or his order, the sum of twenty-eight hundred and sixty-two dollars and thirty-six cents, out of any moneys due me, or to become due, for transporting the mails of the United States between Columbus and Jackson, on mail route No. 3801, and charge, for value received, to your obedient servant,

S. B. STARK.

C. K. GARDNER, Esq.,

Auditor of Post Office Department, Washington city, D. C.

This draft was presented to C. K. Gardner, then Auditor, who refused to receive it, or note it for payment. Some years afterwards it was presented to Elisha Whittlesey, then Auditor, who caused the same to be noted on the books of the office, and afterwards, on a full hearing of the parties, decided that the said draft was good for the one-half of the pay then due on said contract, and for the one-half of what might become due; and subsequently said

draft was paid in full to said Gould, in preference to drafts drawn by the petitioner in the name of Stark & Butterworth.

This decision of the Auditor appears to have been made on two grounds: First, that the parties had made an arrangement to divide their pay, by which each one was authorized to receive or draw for his half of it. And secondly, that the notice did not set aside or disannul that arrangement; that there was such an arrangement, previous to the contract's being changed or transferred to Stark and the petitioner jointly, appears to be true. But the only evidence that such an arrangement was continued after Stark & Butterworth became joint contractors, is the draft drawn by Stark in his own name, in favor of Y. N. Oliver, for \$1,900, which the petitioner afterwards recognised and agreed should be paid from the proceeds of their contract. The notice itself accepts this draft, but directs that no other draft shall be paid, unless drawn by the signature of Stark & Butterworth. The recognition of this draft seems to be the only evidence that the petitioner assented to an arrangement to divide the pay after the joint contract. But, if the transactions of the parties were such as to authorize the Auditor to pay the individual drafts of the contractors, for one-half of the accruing pay, previous to the receipt of the aforesaid notice, the question arises whether it could lawfully and justly be done after such notice was received by the Auditor? By law, and the usage of the department, payments for mail service are usually made to the order or draft of the contractors, in the name in which the contract is made. And, where there are several persons concerned in a contract, any one has authority to use the name in which the contract is executed. If different arrangements are made between them, in respect to the mode of receiving the payments, the Auditor can recognise them or not, as he pleases. In this case neither Stark or the petitioner had any legal right to draw for the whole or one-half of the accruing pay, in his individual name, after the joint contract. But the Auditor could, if he pleased, recognise such an arrangement between them, and make the payments accordingly. But, to be justified in this course, he should have satisfactory evidence that both of the individuals concerned in the contract had assented to the arrangement. As this mode of payment could only be justified by the agreement or assent of the individual partners in the contract, if that agreement or assent was revoked or withdrawn by all or any one of them, payments could no longer be made lawfully or rightfully in that way.

The draft in question was drawn more than three months after the notice before recited had been given. On what principle, then, of law or justice, could the draft drawn by Stark, in his individual name, be paid? It is objected by the Auditor that the notice should have been signed by Stark and the petitioner in their individual signatures. This might have been more proper, but, unless supposed to be a forgery, it must be the act of one if not both of the parties. It was the act of the member of the firm in whose handwriting it was, even if the other partner did not assent to it. It was in the handwriting of the petitioner, and was his act at least;

and had not he a right to revoke the agreement authorizing the payment to be made to the individual partners? We think he had. But it appears from Stark's affidavit that he was knowing to the notice's being given, and assented to it. It was, then, in fact, as it purported to be on its face, the act of both of the partners. This agreement being revoked, the case stood on the same ground as though no such arrangement had been made. The question then is, whether the Auditor, in the case of a joint contract, in the name of Stark & Butterworth, could be justified in paying drafts drawn by them individually, each for one-half of the pay? The committee think not. But the notice made the case still stronger, as the Auditor must have perceived that it was given to protect the rights of the petitioner, it being in his handwriting. And what makes the equity of this case stronger is the fact that, in December, 1839, Stark sold to the petitioner all his interest in the contract and in the property employed in carrying the mail, so that, at the time he drew this draft, he had no interest in the concern.

It is true it does not appear that this sale of the interest of stock was communicated to the Auditor, yet the notice was at least some evidence that there had been some change in the interests of the partners, or their relations to the contract. It was notice that the petitioner, who wrote the letter, wished to protect his own rights.

The committee therefore are of opinion that the act of the Auditor, in paying the draft to James Gould, was clearly illegal, contrary to the usages of the department, and manifestly unjust to the petitioner, who was, at the time it was drawn, entitled to the whole pay arising under the contract. They therefore report a bill to pay him the amount of said draft, wrongfully paid out of the money due on said contract.